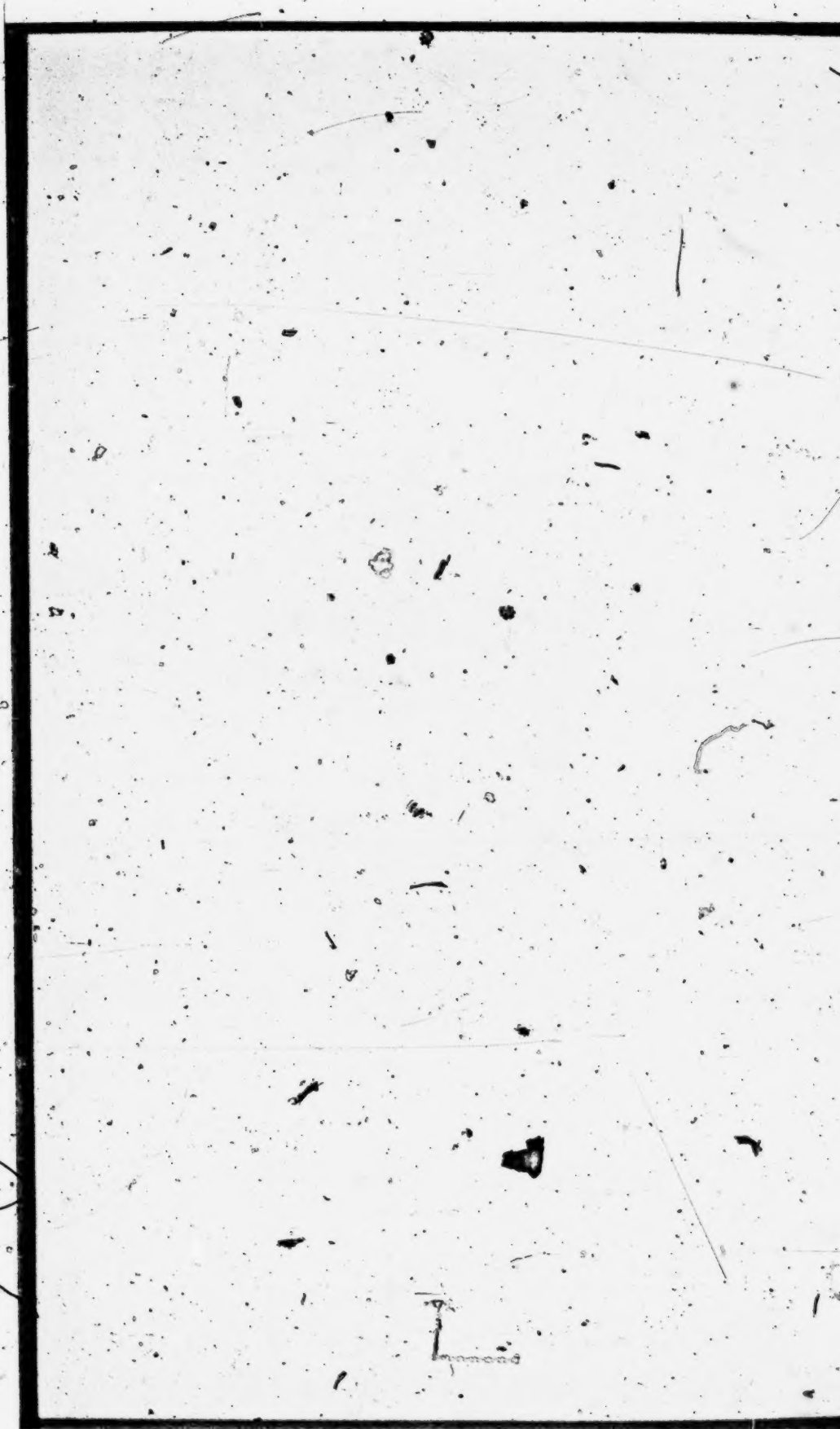

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 620

JAMES L. MOORE, ET AL.,

Plaintiffs,

vs.

SAMUEL SHAPIRO, INDIVIDUALLY AND AS GOVERNOR OF THE STATE OF ILLINOIS, ET AL.,

Defendants.

JURISDICTIONAL STATEMENT.

RICHARD F. WATT,
SHELI Z. ROSENBERG,
ROBERT H. NICHOLS,
Suite 2900,
105 West Adams Street,
Chicago, Illinois 60603,
RICHARD L. MANDEL,
IRA A. KIPNIS,
10 South LaSalle Street,
Chicago, Illinois 60603,
Attorneys for Plaintiffs-Appellants.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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JURISDICTIONAL STATEMENT.

OPINION BELOW.

The opinion below has not been officially or unofficially reported as yet, but a copy is appended hereto in full as Appendix A. The opinion was filed on October 3, 1968. The order of dismissal appealed from was entered on October 1, 1968.

GROUND ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

Jurisdiction of this Court to review the order on direct appeal is conferred by 28 U. S. C. Section 1253.

This is an appeal from an order entered by a three-judge District Court in the Northern District of Illinois on

October 1, 1968. Notice of Appeal was filed on October 4, 1968.

A copy of the order of October 1, 1968 is appended hereto in full as Appendix B.

STATUTES INVOLVED.

This case involves a challenge to the constitutionality of Article 10, Section 3 of the Illinois Election Code. That section reads in pertinent part as follows:

> Nomination of independent candidates (not candidates of any political party), for any office to be filled by the voters of the State at large may also be made by nomination papers signed in the aggregate for each candidate by not less than 25,000 qualified voters of the State; Provided, however, that included in the aggregate total of 25,000 signatures are the signatures of 200 qualified voters from each of at least 50 counties within the State.

QUESTIONS PRESENTED.

1. Is the Supreme Court's decision in *MacDougall* v. *Green*, 335 U. S. 281 (1948) still the law? Has not Justice Douglas' dissent in that case now been adopted by the Supreme Court as a valid statement of the principles governing this cause?

2. Does the 1935 Amendment to Section 3 of Article 10 of the Election Code of Illinois, requiring that nomination petitions for independent candidates for state-wide office must contain not less than 200 signatures from each of at least 50 counties, constitute an arbitrary, unreasonable, and discriminatory restriction on the right of the Illinois voters to nominate and vote for candidates of their own choice in violation of Amendment XIV to the United States Constitution, and particularly the privileges and immunities, equal protection of the laws and due process clauses thereof?

STATEMENT OF THE CASE.

This suit originated as an action for Declaratory Judgment under Section 2201 of the Judicial Code and for injunctive relief as authorized by Section 2202 of the Judicial Code. It was brought by twenty-six independent candidates for the offices of Electors of President and Vice-President of the United States from the State of Illinois. The defendants were the members of the State of Illinois Electoral Board, namely, Samuel Shapiro, Governor, Paul Powell, Secretary of State, Michael J. Howlett, Auditor of Public Accounts, Adlai E. Stevenson, III, Treasurer, William G. Clark, Attorney General, James A. Ronan, Chairman of the State Democratic Central Committee, and Victor L. Smith, Chairman of the State Republican Central Committee. The Board is provided for by Section 7-14 of the Illinois Election Code, Ill. Rev. Stat., Chap. 46, Sec. 7-14.

Electors of President and Vice-President of the United States are to be voted on at the General Election to be held on November 5, 1968. On August 5, 1968, pursuant to Article 10 of the Illinois Election Code, Plaintiffs filed petitions with Defendants containing the names of 26,500 qualified voters who desired to have Plaintiffs nominated as independent candidates for the offices of Presidential Electors. Prior to 1935, Section 3 of said Article 10 required that at least 25,000 electors sign a petition to nominate such candidates. In 1935 that statute was amended. The requirement of at least 25,000 signatures was retained, but the following proviso was added:

> Provided, that included in the aggregate total of twenty-five thousand (25,000) signatures are the signatures of two hundred (200) qualified voters from each of at least fifty (50) counties. (Ill. Rev. Stat. 1967, Chap. 46, Sec. 10-3.)

This section provides the only means whereby qualified voters in Illinois can nominate independent candidates for statewide office. An identical place-of-residence requirement is contained in Section 2 of Article 10 with respect to nominating candidates of a new political party for statewide office.

On August 16, 1968 Defendants ruled that Plaintiffs could not be certified to the county clerks for the November 5, 1968 General Election on the sole ground that the petition

> does not contain signatures of 200 qualified voters from each of at least 50 counties within the State. Said petition only contains 24 counties with over 200 signatures. Therefore, said petition does meet with the requirements of Section 10-3. . . . (Exhibit A of Complaint.)

On August 22, 1968 the Compaint in this cause was filed and assigned to Judge William J. Lynch. The Complaint prayed for a Declaratory Judgment holding and declaring that the amendment to Section 3 of Article 10 requiring 200 signatures from each of at least 50 counties is unconstitutional in violation of the Fourteenth Amendment to the United States Constitution and holding and declaring that the decision of the State Electoral Board with respect to the insufficiency of the nominating petitions is null and void, and that such petitions are valid and sufficient at law to have Plaintiffs' names certified to the county clerks as candidates for the offices of Electors of President and Vice-President. The Complaint further prayed for a decree, under Section 2202 of the Judicial Code, enjoining Defendants from refusing to certify Plaintiffs to the county clerks for such purpose. Finally, the Complaint requested that a three-judge court be convened at the earliest possible opportunity pursuant to Sections 2281 and 2284 of the Judicial Code since Plaintiffs were asking that enforcement of a state statute be enjoined.

On August 26, 1968, pursuant to notice of motion mailed to Defendants on August 22, attorneys for Plaintiffs appeared before Chief Judge William J. Campbell, who was hearing emergency motions, and moved that the District Court advise the Chief Judge of the Court of Appeals for the Seventh Circuit of the application for injunctive relief to the end that a three-judge court be convened pursuant to Sections 2281 and 2284 of the Judicial Code. Chief Judge Campbell declined to grant relief and set the motion down for hearing before Judge Lynch fifteen days thereafter on September 10. Judge Lynch heard and granted the motion on September 11.

Pursuant thereto a three-judge district court was convened. By order of Judge Lynch, briefs were submitted to the three-judge court on September 26, 1968.

Thereafter, without hearing oral argument, the three-judge court issued its order on October 1, 1968. The essence of the court's reasoning is contained in the following paragraph:

> Having jurisdiction of the subject matter and having considered the briefs and authorities submitted by the parties, the Court feels itself bound by *MacDougall* v. *Green*, 335 U. S. 281 (1948), wherein the Supreme Court upheld an identical provision, stating that "it is allowable State policy to require that candidates for state-wide office should have support not limited to a concentrated locality." 335 U. S. 283.

The court denied the request for preliminary injunctive relief, denied the prayer for Declaratory Judgment, and dismissed the complaint for failure to state a cause of action. It is these rulings which are at issue in this appeal.

The three-judge court stated that a memorandum opinion would follow. On October 3, 1968 the three-judge court issued its memorandum opinion. Although amplified somewhat, the reasoning was substantially identical to that contained in the order.

ARGUMENT.

I.

THE 1935 AMENDMENT TO SECTION 3 OF ARTICLE 10 OF THE ILLINOIS ELECTION CODE VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The three-judge court, dismissing Plaintiffs' petition and denying all requested relief, relied solely on this Court's decision in *MacDougall* v. *Green*, 335 U. S. 281 (1948). It is true that the facts presented in the instant case are virtually identical to those present in *MacDougall*.

The facts vary only in that in 1948 the five most populous Illinois counties had 59 per cent of the registered voters; in 1968 they had 61 per cent. In 1948 the forty-nine most populous counties had 87 per cent of the registered voters; in 1968 they had 93.4 per cent. As in the present case, Plaintiffs in the *MacDougall* case were seeking to be certified to the county clerks for a Federal and statewide election without obtaining 200 signatures from each of 50 counties as required by the 1935 amendment to Article 10 of the Illinois Election Code. In the twenty years since the *MacDougall* case, however, the law has changed considerably.

In the *MacDougall* case this Court, by a vote of six to three, affirmed the District Court's denial of an interlocutory injunction and dismissal of the complaint on the basis of *Colegrove* v. *Green*, 328 U. S. 549 (1946), and *Colegrove* v. *Barrett*, 330 U. S. 804 (1946). Justice Rutledge concurred with the majority on the ground that the Court should decline to exercise its jurisdiction in equity. Justice Douglas, with whom Justices Black and Murphy concurred,

dissented, and, it seems manifest, the statement of the law urged in that dissent is now the law of the land.

It may be that Justice Frankfurter's opinion at page 554 in the 1946 *Colegrove* case that judicial enforcement of equality of voting power would constitute "pernicious . . . judicial intervention in an essentially political contest dressed up in the abstract phrases of the law" actually stated the ruling of that case. If it did, the Supreme Court, in the 1962 case of *Baker* v. *Carr*, 369 U. S. 186 (1962), drastically changed the focus for viewing cases which involve political issues. The question in such cases, said the Court at page 226, "is the consistency of state action with the Federal Constitution." This Court held that complainant's allegation that the state's apportionment act resulted in a classification of voters which favored those in some counties over others presented a justiciable cause of action under the equal protection clause of the Fourteenth Amendment.

Since the *Baker* decision, this Court and many District Courts have held numerous state statutes which classified voters and weighted votes on the basis of place of residence for purposes of nomination or election to be unconstitutional, enjoined their enforcement, and ordered elections consistent with the principle of one man, one vote. (See Annotation, "Inequalities In Population of Election Districts or Voting Units as Rendering Apportionment Unconstitutional," 12 L. ed. 2d 1282.)

In *Reynolds* v. *Sims*, 377 U. S. 533 (1964), this Court affirmed the holding of a three-judge court that the existing and proposed apportionment provisions for the Alabama legislature were unconstitutional because they conflicted with the equal protection clause of the Fourteenth Amendment, and affirmed its order for a temporary reapportionment. The existing and proposed statutes apportioned state representatives and senators among districts

and counties so that voters in the more populous counties did not elect their proportionate share of representatives and senators. As stated at 377 U. S. 555:

> The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

This Court dealt squarely with the unconstitutionality of place-of-residence requirements such as that of the 1935 amendment to the Illinois Election Code. "Diluting the weight of votes because of place of residence," it said at page 566, "impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race. . . ." Not place of residence but "population," this Court held at page 567, "is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies."

This Court has left no doubt as to how the issues in *MacDougall* v. *Green*, 335 U. S. 281 (1948), were to be decided under the law as stated in the *Reynolds* case. In footnote 40 at page 563 in the *Reynolds* case, the Court quoted as follows from Justice Douglas' dissent in the *MacDougall* case:

> [A] regulation . . . [which] discriminates against the residents of the populous counties of the state in favor of rural sections . . . lacks the equality to which the exercise of political rights is entitled under the Fourteenth Amendment.
>
> Free and honest elections are the very foundation of our republican form of government . . . . Discrimination against any group or class of citizens in the exercise of these constitutionally protected rights of

citizenship deprives the electoral process of integrity. . . .

> None would deny that a state law giving some citizens twice the vote of other citizens in either the primary or general election would lack that equality which the Fourteenth Amendment guarantees. . . . The theme of the Constitution is equality among citizens in the exercise of their political rights. The notion that one group can be granted greater voting strength than another is hostile to our standards for popular representative government.

Gray v. *Sanders*, 372 U. S. 368 (1963), held that the Georgia county-unit system in statewide primary elections was unconstitutional since it resulted in a dilution of the weight of some votes merely because of where the voters resided. As this Court said at pages 557-58:

> How then can one person be given twice or ten times the voting power of another person in a statewide election merely because he lives in a rural area or in the smallest rural county? Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment.

Here, the geographical unit chosen for nomination and election of Presidential Electors is the State of Illinois. All registered voters must have equal power to nominate and elect, "wherever their home may be in the geographical unit."

Article 10 of the Illinois Election Code contains the only procedure for the nomination of candidates by voters who are not members of established political parties. It permits the forming of new parties and the nomination of independent candidates by nominating petitions. Under the

Illinois Election Code the procedure of nominating by petition under Article 10 is as much an integral part of the whole elective system as are the primary provisions for established parties set out in Articles 7, 8 and 9.

The Illinois Supreme Court has recognized explicitly the role of the nominating process in the elective process. In *People* v. *Election Commissioners,* 221 Ill. 9, 18 (1906), the Court stated unequivocally:

> The right to choose candidates for public offices whose names will be placed on the official ballot is as valuable as the right to vote for them after they are chosen, *and is of precisely the same nature.* (Emphasis added.)

Similarly, in *The People* v. *Fox,* 294 Ill. 263 (1920), the Illinois Supreme Court held the Primary Act of 1919 unconstitutional as contrary to Section 18 of Article II of the Illinois Constitution, saying at page 268:

> Section 18 of the bill of rights provides that all elections shall be free and equal. This language has been construed by this court as meaning that the vote of every qualified elector shall be equal in its influence with every other one. . . . It is well settled in this state that the term 'election' applies to a primary for the nomination of candidates as well as to the election of such candidates to office, and the right to choose candidates for public office, whose names are to be placed on the official ballot, has been held as valuable as the right to vote for them after they are chosen and is of precisely the same nature.

It is well settled that, where a party primary is an integral part of the procedure of election, the right to vote in a primary is a right protected by the United States Constitution. *United States* v. *Classic,* 313 U. S. 299, 314-318 (1941). In *Smith* v. *Allwright,* 321 U. S. 649, 664 (1944), this Court stated:

> When primaries become a part of the machinery for

choosing officials, state and national, as they have here, the same tests to determine the character of discrimination or abridgement should be applied to the primary as are applied to the general election.

Following *Baker* v. *Carr,* 369 U. S. 186 (1962), this Court has applied the same tests to determine the character of discrimination or abridgement in statutes governing the nomination of candidates as in their election. As already noted, *Gray* v. *Sanders,* 372 U. S. 368 (1963), found unconstitutional a county-unit system in statewide primary elections. There, at pages 374-75, it was held that "state regulation of this preliminary phase of the election process makes it state action" within the meaning of the Fourteenth Amendment. *Toombs* v. *Fortson,* 205 F. Supp. 248 (DC Ga., 1962), held unconstitutional a statute which rotated senatorial seats among the counties and permitted only voters in the county selecting the state senator to vote in the primary nominating the senator. *Moore* v. *Moore,* 229 F. Supp. 435 (DC Ala., 1964), held unconstitutional a statute which provided for election of congressmen at-large but which provided for nomination of congressional candidates from districts with unequal populations.

In *Socialist Labor Party* v. *Rhoades,* just decided by a three-judge U. S. District Court for the Southern District of Ohio, and now before this Court as Nos. 543 and 544, several provisions of the Ohio election laws were held to be unconstitutional, including a requirement respecting petitions for nominations of independent candidates for presidential electors. The District Court stated:

> To the extent that the Ohio Election Laws impose unreasonable restrictions on the qualifications of political third parties, restrict minority participation in Ohio's electoral process, prevent candidates for president and vice-president from qualifying as independ-

ents and deprive plaintiffs of their right of suffrage, either by denial of ballot position or effective write-in, they are unconstitutional and void.

As Justice Douglas stated in his dissent in *MacDougall* v. *Green*, 335 U. S. 281 (1948), at page 288:

> The protection which the Constitution gives voting rights covers not only the general election but also extends to every integral part of the electoral process, including primaries. (Citing cases.) When candidates are chosen for the general election by a nominating petition, that procedure also becomes an integral part of the electoral process. It is entitled to the same protection as that which the Fourteenth Amendment grants any other part.

The foregoing review of some of the leading cases subsequent to *Baker* v. *Carr* makes it evident that, while the facts in the present case are virtually identical to those in *MacDougall* v. *Green*, the holding in the latter case no longer determines the issues they present. In *MacDougall* v. *Green*, this Court held at page 283:

> It is clear that the requirement of two hundred signatures from at least fifty counties gives to the voters of the less populous counties of Illinois the power completely to block the nomination of candidates whose support is confined to geographically limited areas. But the State is entitled to deem this power not disproportionate: of 25,000 signatures required, only 9,800, or 39%, need be distributed; the remaining 61% may be obtained from a single county. And Cook County, the largest, contains not more than 52% of the State's voters. It is allowable State policy to require that candidates for state-wide office should have support not limited to a concentrated locality.

All that remains of that holding is the conclusion that the 1935 amendment enables voters from less populous counties to block the nomination of candidates whose support is confined to a majority of the population which re-

sides in geographically limited areas. It is no longer allowable State policy to permit a minority of the voters, simply because of where they reside, to block the nomination of candidates supported by a majority.

"Citizens," said the Court at page 580 in *Reynolds* v. *Sims*, 377 U. S. 533 (1964), "not history or economic interests, cast votes. Considerations of area alone provide an insufficient justification for deviations from the equal population principle. Again, people, not land or trees or pastures, vote. Modern developments and improvements in transportation and communications make rather hollow, in the mid-1960's, most claims that deviations from population-based representation can validly be based solely on geographical considerations.".

Since the "right to vote freely for a candidate of one's choice is of the essence of a democratic society," as this Court said at page 555 of *Reynolds* v. *Sims, supra,* then the method of choosing that candidate must meet the test of the equal protection clause of the Fourteenth Amendment. Under the 1935 amendment to Article 10 of the Illinois Election Code, petitions signed by every one of the 93.4 per cent of the state's qualified voters who reside in the most populous counties could not nominate a single candidate for Presidential Elector. On the other hand, petitions signed by 25,000 of the 6.6 per cent of the state's qualified voters properly distributed in fifty of the fifty-three least populous counties could nominate a complete slate of candidates. Such classification of voters on the basis of where they live is contrary to the equal protection clause of the Fourteenth Amendment and is, therefore, unconstitutional.

II.

THE 1935 AMENDMENT TO SECTION 3 OF ARTICLE 10 OF THE ELECTION CODE REQUIRING 200 SIGNATURES FROM EACH OF 50 COUNTIES CONSTITUTES AN ARBITRARY, UNREASONABLE, AND DISCRIMINATORY RESTRICTION ON THE RIGHT OF ILLINOIS VOTERS TO NOMINATE AND VOTE FOR CANDIDATES OF THEIR OWN CHOICE.

As discussed above, the *sole* authority on which the three-judge court relied in upholding Section 3 of Article 10 has, through a long series of decisions of this Court, been thoroughly undercut. However, there are additional reasons which mitigate against its continued viability.

The requirement here in issue was added by amendment in 1935. *Laws,* 1935, p. 789. Before that amendment, the signatures required to nominate independent candidates for statewide offices, and for Presidential Electors, were counted on a statewide basis and only in terms of the total to be obtained: 25,000 signatures of qualified voters in the state. The requirement for nominating candidates of a new political party was identical.

The 1935 amendment added an additional and weighted requirement based on the place of residence of the registered voters. The 1935 amendment made it mandatory that the 25,000 registered voters meet a further, and, in view of the population distribution in Illinois, highly unequal requirement as to their place of residence within the statewide geographical unit for which candidates were to be elected. The 25,000 signatures must include those of at least 200 registered voters from each of 50 counties. In other words, under the 1935 amendment, the signatures of neither 25,000 registered voters nor of 4,000,000 registered voters will satisfy the statutory requirement for nomination of independent or new-party candidates unless

they meet place-of-residence requirements contrary to the population-based requirements of the Fourteenth Amendment.

The distribution of population among the 102 Illinois counties shows the extent to which the 1935 amendment debases and dilutes the right of qualified voters to participate in the electoral process.

More than 50 per cent of the total Illinois population and more than 50 per cent of the Illinois registered voters reside in *one* county, Cook County.

Approximately 61 per cent of the Illinois registered voters reside in the state's *five* most populous counties: Cook, DuPage, Lake, Madison, and St. Clair.

Approximately 93.4 per cent of the Illinois registered voters reside in the state's *forty-nine* most populous counties: Cook, DuPage, Lake, Madison, St. Clair, Adams, Bureau, Champaign, Christain, Clinton, Coles, DeKalb, Franklin, Fulton, Hancock, Henry, Iroquois, Jackson, Jefferson, Kane, Kankakee, Knox, La Salle, Lee, Livingston, Logan, Macon, Macoupin, Marion, McDonough, McHenry, McLean, Montgomery, Morgan, Ogle, Peoria, Randolph, Rock Island, Saline, Sangamon, Shelby, Stephenson, Tazewell, Vermillion, Whiteside, Will, Williamson, Winnebago and Woodford.

Approximately 6.6 per cent of Illinois registered voters reside in the *fifty-three* remaining counties.

The 1935 amendment thus prevents the majority of the state's registered voters who reside in Cook County from nominating independent candidates for Presidential Electors and statewide offices or from forming a new political party in the state for those purposes.

The 1935 amendment also prevents the 61 percent of the state's registered voters who reside in Cook, DuPage, Lake, Madison, and St. Clair Counties from nominating in-

dependent candidates for Presidential Electors and statewide offices or from forming a new political party in the state for those purposes.

The 1935 amendment even prevents the 93.4 per cent of the state's registered voters who reside in the state's forty-nine most populous counties from nominating independent candidates for Presidential Electors and statewide offices.

But the 1935 amendment permits 25,000 of the remaining 6.6 per cent of the registered voters properly distributed among fifty of the fifty-three least populous counties to nominate such candidates or to form such a new party.

The effect of the 1935 amendment is drastically to debase the weight of a qualified voter in a populous county as against the weight of a qualified voter in the less populated counties. No number of additional signatures over and above the required 200 in a populous county can overcome the lack of 200 in one of the less populated counties. One qualified voter does not have the same right to nominate as every other qualified voter. His signature on a nominating petition counts only if he resides in the right county. And the smaller the population of the county in which he resides, the more his signature counts.

The grotesque nature of the 1935 amendment to Article 10 of the Illinois Election Code is illustrated by the fact that the voters of Cook County, since they outnumber the voters of all the rest of the state put together, could elect the Presidential Electors, a United States Senator, and various statewide officers in the face of the united opposition of the voters of the other 101 counties. Indeed, that possibility is required by the Fourteenth Amendment to the United States Constitution.

Nevertheless, although that majority can elect, under the Illinois Election Code it cannot nominate. Although the minority cannot elect, it can nominate.

In fact, the majority cannot really elect in Illinois. The power of a majority to elect must mean the power to elect candidates of its and not the minority's choice. Since the majority cannot nominate candidates without the support of the minority, it can only elect candidates the minority has also agreed to choose.

It is clear, therefore, that the 1935 amendment to Article 10 of the Illinois Election Code heavily overweights the electoral power of voters residing in less populous counties and greatly underweights the electoral power of voters residing in the populous counties. The 1935 amendment deviates drastically from the rule of one man, one vote.

The three-judge court seeks solace from these inescapable facts in this Court's decision in *Dusch* v. *Davis,* 387 U. S. 112 (1967). In that case, this Court upheld a so-called "Seven-Four Plan" establishing residency requirements for prospective candidates for the City Council of a governmental unit of seven boroughs composed of what had formerly been the City of Virginia Beach and Princess Anne County. However, the crucial distinction between that case and the one at bar was emphasized by Mr. Justice Douglas, writing for the Court, when he noted that "the plan uses boroughs in the city 'merely as the basis of residence for candidates, not for voting or representation.'" 387 U. S. at 115. The provision of the Illinois Election Code here under attack does not establish residency requirements for candidates seeking state-wide office. Rather, it directly affects the weight of a vote of certain citizens of the state and thus suffers the precise infirmity which Justice Douglas failed to find in the *Dusch* case. It is submitted that the distinction between the two cases is obvious.

III.

THE INVALIDATION OF THE 1935 AMENDMENT WOULD LEAVE THE ILLINOIS ELECTION CODE INTACT IN ITS ORIGINAL FORM. PLAINTIFFS HAVE FULFILLED THE REQUIREMENTS OF THAT CODE.

The only provision assailed as unconstitutional in this suit is the 1935 amendment to Article 10 of the Illinois Election Code which requires that 200 signatures be obtained from each of 50 counties. The invalidation of this amendment as unconstitutional would not nullify the entire Illinois Election Code. Instead, it would leave the legislation intact in its original form. *People* v. *Alteric*, 356 Ill. 307 (1934). The Code would then only require that 25,000 qualified voters sign a petition to nominate independent candidates for Presidential Electors regardless of their place of residence.

Plaintiffs presented such a petition to the State Electoral Board. That Board refused to certify Plaintiffs to the county clerks solely because the petition failed to satisfy the unconstitutional place of residence requirements of the 1935 amendment. (Exhibit A to Complaint.) Plaintiffs, therefore, have fulfilled the constitutional statutory requirements for certification and should be certified to the county clerks as candidates for Electors of President and Vice President of the United States. Since ballots will soon be printed for the November 5, 1968 general election, Plaintiffs will not be so certified unless this Court declares the right of Plaintiffs to be so certified and rules that Defendants should be enjoined from declining or refusing so to certify them.

Sidney T. Holtzman, chairman of the Chicago Board of Election Commissioners stated that bids for printing the ballots would be opened on September 26, 1968 and that

printing would begin shortly thereafter (Chicago Sun Times, September 20, 1968, page 72). Consequently, it was essential that appellants seek a preliminary injunction in order to protect their constitutional rights.

CONCLUSION.

The cases of *Baker* v. *Carr*, 369 U. S. 186 (1962), *Gray* v. *Sanders*, 372 U. S. 368 (1963) and *Reynolds* v. *Sims*, 377 U. S. 533 (1964), as well as the many election cases which have followed, have settled that the district courts have jurisdiction of a suit such as this which attacks a state statute as unconstitutional on the ground that it deprives persons of equal protection of the laws by debasing and diluting their right to nominate and vote; that such suits state a justiciable cause of action; that persons such as Plaintiffs have standing in such suits to challenge state statutes as unconstitutional for violating the Fourteenth Amendment; and that declaratory and injunctive relief are appropriate remedies in such suits.

For all of the reasons stated above, Plaintiffs-Appellants respectfully submit that their prayer for declaratory and injunctive relief as set forth in their Complaint should have been granted and that the three-judge court erred in dismissing the cause. It is urged that this Court note probable jurisdiction, hear the cause, and thereupon reverse.

Respectfully submitted,

RICHARD F. WATT,
SHELI Z. ROSENBERG,
ROBERT H. NICHOLS,
RICHARD L. MANDEL,
IRA A. KIPNIS,
Attorneys for Plaintiffs-Appellants.

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois, Eastern Division.

JAMES L. MOORE, *et al.*,
Plaintiffs,
v.
SAMUEL SHAPIRO, *et al.*,
Defendants.
No. 68 C 1569

MEMORANDUM OF DECISION.

Before HASTINGS, *Circuit Judge,* DECKER and LYNCH, *District Judges.*

Per Curiam: This action was brought before a three-judge District Court convened in the Northern District of Illinois under 28 U. S. C. §§ 2281 and 2284, by twenty-six independent candidates for the offices of Presidential and Vice Presidential electors from the state of Illinois. Defendants are members of the Illinois Electoral Board.

On August 5, 1968 plaintiffs filed nominating petitions signed by 26,500 qualified voters. Defendants ordered the county clerks to refuse to certify plaintiffs for the November 5, 1968 General Elections because plaintiffs' petition did not comply with certain provisions of Section 10-3 of Chapter 46, Illinois Revised Statutes 1967. This Section, along with Section 10-2 of the same Chapter, was amended in 1935 by the addition of the following qualification: "Pro-

vided that included in the aggregate total of twenty-five thousand (25,000) signatures are the signatures of two hundred (200) qualified voters from each of at least fifty (50) counties." Plaintiffs' petition did not contain signatures of 200 such voters from each of 50 counties.

Plaintiffs herein are seeking a Declaratory Judgment, pursuant to 28 U. S. C. 2201, holding the above proviso unconstitutional; declaring the action of the Electoral Board in refusing to order certification of plaintiffs by the county clerks null and void; and declaring plaintiffs' petition valid and sufficient for nomination. The Complaint further seeks an injunction, under 28 U. S. C. 2202, prohibiting defendants from refusing to certify plaintiffs to the county clerks for nomination.

JURISDICTION.

An identical 1935 Amendment qualifying Section 10-2, Ch. 46, Illinois Revised Statutes, 1967 which prescribes the requirements for nominating an independent third party, was challenged before the Supreme Court twenty years ago in *MacDougall* v. *Green,* 335 U. S. 281, 69 S. Ct. 1, 93 L. Ed. 3. A three-judge District Court therein had previously dismissed the action for lack of jurisdiction. The Supreme Court affirmed *after* a hearing on the merits. Commenting on this apparent inconsistency, Justice Brennan, in the majority opinion of *Baker* v. *Carr,* 369 U. S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663, noted the Supreme Court's disagreement with the District Court's finding of a lack of jurisdiction. 369 U. S., at 203.

The *MacDougall* and *Baker* cases are controlling on the issue of jurisdiction in present action. Voting rights are secured by the Equal Protection Clause of the Fourteenth Amendment. The Federal District Courts have jurisdiction under 28 U. S. C. § 1343 (3) " . . . to redress the deprivation, under color of any State law, statute, ordinance,

regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States." This grant clearly gives this Court jurisdiction to hear the matter before it.

The Constitutional Issue.

The provision of the Illinois Election Code being challenged in this action was found to be constitutional by the Supreme Court of the United States in the case of *MacDougall* v. *Green, supra.* In *Baker* v. *Carr, supra,* Justice Brennan noted the Supreme Court's prior decision thusly:

> "In *MacDougall* v. *Green,* (cite omitted), the District Court dismissed for want of jurisdiction, which had been invoked under 28 U. S. C. § 1343 (3), 28 U. S. C. A. § 1343 (3), a suit to enjoin enforcement of the requirement that nominees for state-wide elections be supported by a petition signed by a minimum number of persons from at least 50 of the State's 102 counties. This Court's disagreement with that action is clear since the Court affirmed the judgment after a review of the merits and concluded that the particular claim there was without merit." 369 U. S., 203.

The facts of the *MacDougall* case and the case before the bar are virtually identical except for insubstantial shifts in the concentration of population in the various Illinois counties.[1] Plaintiffs in this case, while admitting that the

1. Both plaintiffs in the present case and in the *MacDougall* case alleged that more than half of the registered voters in Illinois reside in one county. (Complaint, Par. 10; 355 U. S., at 28.) Plaintiffs presently allege that 61% of the State's voters are now registered in five counties compared with 59% in the same five counties in 1948. (Complaint, par. 34; *MacDougall* v. *Green,* U. S. Dist. Ct., N. D. of Ill., No. 48 C 1406.) Plaintiffs allege that 93.4% of the voters reside in 49 counties compared with 87% in the same 49 counties in 1948. (Complaint, par. 11; 355 U. S., at 283.)

MacDougall decision bears directly against them, contend that the holding of the *MacDougall* case should be disregarded on the theory that the line of cases beginning with *Baker* v. *Carr* in 1962 has overruled the *MacDougall* decision by implication.

Justice Clark, concurring in the decision of the majority in *Baker,* was able to distinguish that case from *MacDougall* (and, therefore, also from the instant case) thusly:

> "I take the law of the case from *MacDougall* v. *Green* (cite omitted), which involved an attack under the Equal Protection Clause upon an Illinois election statute. The Court decided the case on its merits without hindrance from the 'political question' attack. Although the statute was upheld, it is clear that the Court based its decision upon the determination that the statute represents a rational state policy." 369 U. S., at 251, 252.

Justices Clark and Stewart agreed that the Tennessee apportionment statute under attack was, contrary to the Illinois statute in *MacDougall,* totally unreasonable and arbitrary.

Ordinarily, discovery of precedent in the form of a Supreme Court decision squarely on point determines an issue. However, in the area of voting rights today we must go further and ask whether or not what was considered to be a "rational state policy" in 1948 is still considered as such today.

It is clear that Justices Clark and Stewart concurring in the *Baker* decision, were of the opinion that apportionment of a state legislature, if done on a rational basis, need not be based strictly on population. However, a more strict approach has evolved from subsequent Supreme Court cases. Today, the apportionment of legislative representation in virtually all levels of government must be based on population as nearly as possible. See *Wesbury* v.

Sanders, 376 U. S. 1, 84 S. Ct. 526, 11 L. Ed. 2d 481; *Reynolds* v. *Sims*, 377 U. S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506; *Avery* v. *Midland*, 36 L. W. 4257 (1968).

Some divergence from this standard is necessary, but the character and amount of such divergence which will be tolerated is unclear. Chief Justice Warren, in *Reynolds* v. *Sims, supra*, has pointed out that the Supreme Court presently deems it:

> "expedient not to spell out any precise constitutional tests. What is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case. Developing a body of doctrine on a case-by-case basis appears to us to provide the more satisfactory means of arriving at detailed constitutional requirements in the area of state legislative reapportionment." 377 U. S., at 578.

While it is clear that constitutional standards in this area may vary among the national, state, county and municipal levels as well as from State to State, we find some guidance from a 1967 Supreme Court case.

The case of *Dusch* v. *Davis*, 387 U. S. 112, 87 S. Ct. 1554, 18 L. Ed. 2d 656, involved a local plan consolidating the City of Virginia Beach and Princess Anne County into a new governmental unit of seven boroughs which vary considerably in population. The plan (called the "Seven-Four Plan") created an eleven-member city council elected at large. Each of seven council members must reside in a different one of the boroughs.

Plaintiffs therein alleged that the plan violated "the principles of *Reynolds* v. *Sims*." The District Court approved the plan, but the Court of Appeals for the Fourth Circuit reversed, 361 F. 2d at 497. The Supreme Court upheld the District Court. Justice Douglas, writing the opinion of the Court, found that "the plan uses boroughs in the city 'merely as the basis of residence for candidates,

not for voting or representation.'" 387 U. S., at 115. The Court further noted that "The Seven-Four Plan seems to reflect a detente between urban and rural communities that may be important in resolving the complex problems of the modern megapolous in relation to the city, the suburbia, and the rural countryside." 387 U. S., at 117. No invidious discrimination was found in the plan.

The "Seven-Four Plan" and the challenged Illinois Election Code provision share the same underlying principles—they are but different means to the same effect. The District Court in the *Dusch* case decided that:

> "The Seven-Four Plan is not an evasion scheme to avoid the consequences of reapportionment or to perpetuate certain persons in office. The plan does not preserve any controlling influence of the smaller boroughs, but does indicate a desire for intelligent expression of views on subjects relating to agriculture which remains a great economic factor in the welfare of the entire population."

This description applies equally well to the residence requirements within Sections 10-2 and 10-3 of the Illinois Election Code. The purpose of these provisions is obviously to require a state-wide candidate to show minimal state-wide support. An elected official on the state level represents all the people in the state. Such representatives should be aware of and concerned with the problems of the whole State and not just certain portions thereof. This is the policy behind the challenged provision; it is a rational policy. It is accomplished without undue burden on the potential candidates and without unnecessary interference with the weight or the effectiveness of an Illinois citizen's right to vote.

In fact the right to vote in Illinois would only be unreasonably affected if, somehow, virtually entire populations of 53 of the lesser populated counties decided to preclude a majority of the State's qualified voters from nomi-

nating candidates of their choice. This does not appear likely. If such schemes ever came to light, the situation can be re-examined.

Thus, this Court finds that Section 10-3 of the Illinois Election Code, Ch. 46, Illinois Revised Statutes 1967, is an expression of rational state policy and that, therefore, it is constitutional under *MacDougall* v. *Green, supra.* As was pointed out in *Baker* v. *Carr, supra,* "*MacDougall* v. *Green,* (cite omitted), held only that in that case, equity would not act to void the State's requirement that there be at least a minimum of support for nominees for state-wide office, over at least a minimal area of the State." 369 U. S., at 234. This Court agrees with that course of action and follows the same in dismissing the present Complaint.

In sum, plaintiffs contend that, although the case of *MacDougall* v. *Green, supra,* is a direct precedent against their constitutional claims, the Supreme Court today would overrule *MacDougall* v. *Green* and that, in effect, we should hold this precedent not to be controlling. The short answer to this is that the Court itself has cited *MacDougall* v. *Green* in a number of recent decisions and has considered it to be a holding on its merits and has not set aside such a determination. We do not deem it to be our function to second guess and overrule a standing precedent in the identical case now before us. We believe that to be the sole prerogative of the Supreme Court and we respectfully decline to usurp that function.

JOHN S. HASTINGS,
Circuit Judge, United States Court of Appeals.

BERNARD M. DECKER,
Judge, United States District Court.

WILLIAM J. LYNCH,
Judge, United States District Court.

Dated: Oct. 3, 1968.

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois,
Eastern Division.

JAMES L. MOORE, *et al.*, *Plaintiffs*,
vs.
SAMUEL SHAPIRO, *et al.*, *Defendants*.
No. 68 C 1569.

ORDER.

This action was brought before a three-judge District Court convened in the Northern District of Illinois under 28 U. S. C. §§ 2281 and 2284 by twenty-six independent candidates for the offices of Presidential and Vice Presidential electors from the state of Illinois. Defendants are the members of the Illinois Electoral Board.

On August 5, 1968 plaintiffs filed nominating petitions signed by 26,500 qualified voters pursuant to the provisions of Illinois Revised Statutes, Ch. 46 § 10-3. Defendants ordered the county clerks to refuse to certify plaintiffs for the November 5, 1968 General Elections because plaintiffs' petition did not comply with the provisions of Section 10-3 of Chapter 46, Illinois Revised Statutes 1967. This Section, along with Section 10-2 of the same Chapter, was amended in 1935 by the addition of the following qualification: "Provided that included in the aggregate total of twenty-five thousand (25,000) signatures are the signatures of two

hundred (200) qualified voters from each of at least fifty (50) counties."

Plaintiffs herein are seeking a Declaratory Judgment pursuant to 28 U. S. C. § 2201, holding the above proviso unconstitutional; declaring the action of the Electoral Board in refusing to order certification of plaintiffs by the county clerks null and void; and declaring plaintiffs' petition valid and sufficient for nomination. The Complaint further seeks an injunction under 28 U. S. C. § 2202, prohibiting defendants from refusing to certify plaintiffs to the county clerks for nomination.

Having jurisdiction of the subject matter and having considered the briefs and authorities submitted by the parties, the Court feels itself bound by *MacDougall* v. *Green*, 335 U. S. 281 (1948), wherein the Supreme Court upheld an identical provision, stating that "it is allowable State policy to require that candidates for state-wide office should have support not limited to a concentrated locality." 335 U. S. 283.

IT IS HEREBY ORDERED:

1. That the prayer for Temporary Injunction is denied

2. That the prayer for Declaratory Judgment is denied.

3. That the complaint is dismissed for failure to state a cause of action.

A memorandum decision will be issued soon.

ENTER:

JOHN S. HASTINGS,
Circuit Judge, United States Court of Appeals,

BERNARD M. DECKER,
Judge, United States District Court,

WILLIAM J. LYNCH,
Judge, United States District Court.

Dated: October 1, 1968.